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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. ~~1109~~ 84

OBED M. LASSEN, COMMISSIONER,
STATE LAND DEPARTMENT
Petitioner,

vs.

THE STATE OF ARIZONA, EX REL.
ARIZONA HIGHWAY DEPARTMENT,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A
WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF ARIZONA

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The asserted conflicts are non-existent. The holding of the Court below rests upon its resolution of a factual question which was not to issue in any of the cases cited. The Arizona Court has only agreed with the holdings of the other states that trust lands cannot be disposed of except for value; the principle of "equity" mentioned above which the opinion purports

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The Petitioner urges that the Court should grant certiorari on the ground that the decision of the Arizona Supreme Court conflicts with the decision of the New Mexico Supreme Court in *State ex rel State Highway Commission v. Walker*, 61 N.M. 374, 301 P.2d 317 (1956), and with other decisions of other state courts. It is also asserted that there is a conflict "in principle" with a 1919 decision of this Court, *Ervien v. United States*, 251 U.S. 41, 40 S.Ct. 75.

The asserted conflicts are non-existent. The holding of the Court below rests upon its resolution of a factual question which was not at issue in any of the cases cited. The Arizona Court not only agrees with the holdings of its sister states that trust lands cannot be disposed of except for value; this principle is the major premise from which its opinion proceeds.

Moreover, even if the holdings of the New Mexico and the Arizona Courts were in conflict, and even if the conflict were on a point of law, the issue would not be one which would warrant review by this Court.

I

There is no Conflict Because the Decision of the Court Below Rests Upon a Determination of Fact

The Enabling Acts of the States of Arizona and New Mexico designate certain lands whose proceeds are to be administered as trust funds for the benefit of specified state institutions. Under the Enabling Acts of these two States, lands so designated are not to be disposed of without "value" being received therefor.¹

There are various means by which parcels of these trust lands can be used or disposed of so as to enhance the total "value" of the "trust fund." One such means is to charge specific prices for every parcel of land sold, leased, or encumbered. But this is not by any means the only method—nor is it necessarily the most effective —by which this end may be accomplished.

The narrow issue with which the Court below dealt was this: Proceeding from the premise that trust lands may not be disposed of except for value, does the construction of highways in Arizona across certain portions of the total package of Arizona trust lands result in a net value enhancement to such lands taken as a whole? Alternately stated, the question was, is the total bundle

¹ § 28 of the Arizona Enabling Act, 36 Stat. 557, 568, 575, provides in part:

"All lands, leaseholds, timber and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained. . . ." (Emphasis added.)

of Arizona trust lands, after a small portion of them has been used for highways, of greater value because of the presence of the highways?

The Court's unanimous holding was that "the determination of benefit upon trust lands is made upon the basis of whether the proposed benefit results in an overall benefit to the trust lands as a whole. The value of these large tracts of trust lands is greatly enhanced by the building of the highway system through and to the same." (Pet. App. B, p. 33.)

In dealing with this factual issue of value enhancement to trust lands in Arizona resulting from the construction of highways, the Court below was not writing on a clean slate, but was simply reaffirming its prior holdings in two cases, *Grossetta v. Choate*, 51 Ariz. 248, 75 P.2d 1031 (1938) and *State of Arizona ex rel Conway v. State Land Department*, 62 Ariz. 248, 156 P.2d 901 (1945), both of which involved the basic problem of construction of roads and highways across State trust lands. In *State v. State Land Department*, the Court cited "with approval a portion of the opinion [in *Ross v. Trustees of University of Wyoming*, 30 Wyo. 433, 222 Pac. 3, on rehearing 31 Wyo. 464, 228 Pac. 642 (1924)] as applicable to the question under consideration." Part of the language which the Arizona Court cited with approval is the following:

"For the natural tendency of the grant, [of rights of way for road purposes] reasonably made, across such lands, under the conditions described in the original opinion, is to enhance rather than to lessen their salable

or rental value." (Emphasis added.) 62 Ariz. at 254.² In the instant case, the Arizona Court simply declined to overrule its holdings in these two prior cases that as a matter of fact the construction of highways across trust lands in Arizona results in a benefit to these trust lands taken as a whole.

The New Mexico Court in the *Walker* case, this Court in the *Ervien* case, and other courts cited in the petition have held that trust lands may not be disposed of without value having been received therefor. The Arizona Court is in perfect agreement with this principle. The only point of departure between the holdings of those courts and the holding of the Arizona Court in the instant case is that the Arizona Court—proceeding from the major premise that lands may not be disposed of without value having been received in return—made a second determination—a factual determination—which the cases cited by a Petitioner did not make.³

Therefore, the cleavage between the results reached

² Similarly, in its earlier *Grosseta v. Choate* case, the Court had held:

"We think the restrictions in the grant of such lands, as to their disposition or use by the state, were intended to prevent their sacrifice and to obtain for the institutions to be benefited the best and highest price obtainable, and not to prevent or impair the construction of highways necessary for the convenience and comfort of the owners and patrons of such institutions." (Emphasis added.) 51 Ariz. at 251.

³ The Petitioner's conclusory assertions to the contrary notwithstanding, the lower Court's decision does not rest upon the difference between a fee and an easement, but rather on its determination that "both the granting of the rights of way and material sites enables building of highways, and are of material benefit to trust lands as a whole, and enhance the value of the land thereof." (Pet. App. B, p. 35.) The determinative question is value enhancement; whether the interest taken is characterized as a fee or an easement is totally immaterial to that question.

by the Arizona and New Mexico Courts rests upon a determination of fact. On that factual issue there is no conflict, because the issue was never considered by the New Mexico Supreme Court. Hence, the issue in this Petition boils down to whether this Court should grant certiorari to review a determination by the Arizona Supreme Court that the use of trust lands in Arizona for the construction of highways in Arizona results in a net increase in the value of the entire package of Arizona trust lands.

The Petition itself points out the real difference between the Petitioner and the Arizona Court:

"Whatever values these splendid new roads may have for the motoring or trucking public, they are in a major degree totally destructive of the use of the land for the primary purpose of the trust. These highways may give vast benefits, and doubtless do, to the interstate traveler but not to the land itself, which is completely destroyed in its usefulness as revenue producing acreage." (Pet. p. 12)

This is colorful language, but it is supported by nothing more authoritative than its own rhetoric. Moreover, the issue to which it is directed is an issue of fact. On that issue the Arizona Supreme Court has held precisely the opposite on three separate occasions.

Even assuming that the factual issue on which the holding in this case depends would warrant review by this Court — and clearly it would not — such a review would be impossible here because the factual determination was not made in this case. As the Petitioner has pointed out, this action arose as an original Writ of Prohibition in the Arizona Supreme Court challenging a ruling by the State Land Commis-

sioner. There was no evidence taken in connection with that ruling by the Land Department on the issue of benefit accruing from the construction of highways. Neither was there a trial in the case. The Court simply reaffirmed its two prior holdings on the question of the effect of highways on the value of trust lands. There is therefore no record which this Court could review for the purpose of ascertaining whether the factual determination upon which the Arizona Court's holding rests is correct or incorrect.

The difficulties of reviewing a decision which rests upon a factual determination—but in which, because of the peculiar way it arose, there is no record—are amply attested by the Petition itself. For example, an assertion that the State Land Department has prepared certain information and has supplied this information to its attorney is hardly an adequate substitute for a record. Similarly, the Petition contains references to alleged statements of intent by various State agencies, as though such statements were part of the record. They are not, because indeed there is no record. These are only a few of the numerous instances in which the Petitioner has found it necessary to make conclusory assertions of fact which are of course not cognizable on this Petition for Certiorari.

By making these bald factual assertions, the Petitioner correctly recognizes that to upset the decision which the Arizona Supreme Court has now affirmed for the third time in twenty-eight years, it must attack the factual basis on which the Court's decision rests. What the Petitioner fails to recognize is that a Petition to this Court for a Writ of Certiorari is too late to start introducing evidence.

II

**Cases Cited by the Petitioner From Other Jurisdictions
are Similarly Not on Point**

In not a single one of the State cases cited by the Petitioner and asserted to be in conflict with the decision of the Arizona Court here did the Court go beyond the obvious holding that trust lands may not be disposed of except for value, and consider the further question of whether in fact highway construction results in net value enhancement.

On the other hand, in those instances in which state and federal courts have dealt with this problem, their holdings have been in unanimous accord with the view adopted by the Arizona Supreme Court in this case and on two prior occasions.⁴

⁴ In *Ross v. Trustees of University of Wyoming*, *supra*, the Wyoming Court in speaking of the Enabling Act of that State said that "In acts of that kind we see a Congressional recognition of the public necessity of the improvements thus aided, and a purpose to enhance the value and hasten the settlement of the public lands affected." 222 Pac. at 5.

Similarly, the New Jersey Court, in discussing what uses the State of New Jersey could make of lands designated by that State's Constitution for the Support of schools observed in *Henderson v. Atlantic City*, 64 N.J. Eq. 583, 54 Atl. 533 (1903): [The State] could probably grant a perpetual right to lay out streets or highways through it, regarding the presence of such streets as likely to enhance the value of the property."

United States v. The Railroad Bridge Company, 6 McLean 517, Fed. Cas. No. 16,114 (N.D. Ill. 1855) was a case involving a right of way across public lands of the United States which at one time had been reserved for military purposes. The opinion was written by Mr. Justice McLean, an Associate Justice of this Court, who held that such improvements "encourage population, and increase the value of the land. In no respect is the exercise of this power by the state inconsistent with the fair construction of the Constitutional power

(Footnote Continued)

Since it is a decision by this Court, *Ervien v. United States* deserves special mention. A logical reason why *Ervien* was not mentioned by the Court below is that it simply is not on point. It did not involve the construction of any type of improvements—highways or otherwise. Rather, trust funds were to be used for advertising the "resources and advantages of [the State of New Mexico] generally."

If relevant at all, *Ervien v. United States* supports the lower Court's holding. *Ervien* was a suit which was brought by the United States Attorney General, the authority charged with the primary responsibility of enforcing the provisions of the Enabling Acts of Arizona and New Mexico. In the instant case, unlike *Ervien*, the Attorney General has not questioned the State policy involved, even though it is of more than fifty (50) years standing, and was in effect at the very time that *Ervien v. United States* was decided.

Under the operation of the principle that interpreta-

of Congress over the public lands. It does not interfere with the disposition of the lands, and instead of lessening enhances their value." (Emphasis added.) (The foregoing language was cited in *Ross v. Trustees of University of Wyoming*, on re-hearing, 31 Wyo., 464, 228 Pac. 642, 646 (1924)).

The Supreme Court of Minnesota, in answer to a contention that a statute granting a right of way to railroad companies over school or university lands held by the State was repugnant to a provision in that State's Constitution forbidding the sale of such lands other than by public auction, stated in *Lawver v. Great Northern Ry. Co.*, 112 Minn. 46, 127 N.W. 431, 432 (1910) as follows:

"We doubt the soundness of this contention. The constitutional provision was intended to prevent the secret sale and possible sacrifice for an inadequate price of that portion of the public domain granted to the state for educational purposes. The construction of the railroad across such lands would not only bring them into the market, but add materially to their market value." (Emphasis added.)

tions placed upon a statute by the agency charged with the administration of the statute are entitled to great weight, *Udall v. Tallman*, 380 U.S. 1, 85 S.Ct. 792 (1965), the United States Attorney General's tacit acceptance of the practice involved here is further conclusive that the holding of the Arizona Court is correct. Where state practices are truly inimical to the policies of the Congressional Act which became the Arizona and New Mexico Enabling Acts, the agency charged with the enforcement of this Federal statute has taken the proper corrective measures.⁵

III

This Case Involves the Type of Problem That Should be Left to the Courts of the Individual States

Finally, even if there were a square conflict on a principle of law, this case would still not involve the type of problem which warrants review by this Court.

While it is true that Enabling Acts are Congressional statutes, they are statutes which are peculiarly pointed toward state, rather than national affairs, and which set policy guidelines not for the nation as a whole, but for

⁵ It is true that § 28 provides that ". . . nothing herein contained shall be taken as a limitation of the power of the State or of any citizen thereof to enforce the provisions of this Act."

The position taken by the Petitioner here could hardly be said to represent the view of the "State" as to the meaning of the Enabling Act. As amply demonstrated by the positions taken by the parties in this case, there is a divergence of opinion among the subdivisions of the "State" on this problem. Moreover, § 28's express provision that the United States Attorney General is charged with enforcing the provisions of the Act would imply that efforts by the State or by individual citizens to effectuate these policies are to be restricted to the clearest kinds of violations. A practice which has received approval by the Arizona Supreme Court three times over a period of 28 years hardly qualifies.

the particular states. By and large, the problems arising from the interpretation of Enabling Acts are problems of the various states. As a matter of comity as well as sound judicial administration, the bulk of these problems have been and should be left to the courts of the individual states, since those courts are more familiar with the background of the issues and the total contexts in which they arise.⁶

Manifestly, this is such a case. Stated in the most expansive possible terms, the legal question in this case is whether one agency of the State of Arizona must pay another agency of the State of Arizona for lands which are located within the State of Arizona and which the first agency uses for the purpose of constructing highways in Arizona. Formulation of policy involving payments between two Arizona agencies and determination of the question whether as a matter of fact construction of highways in Arizona results in a net benefit to certain Arizona lands, are matters particularly within the capabilities of the Arizona Courts.

CONCLUSION

For more than a half century, State and county highways have been constructed across trust lands in Arizona without any inter-departmental payments being required. This is the third time that the Arizona Supreme Court has held that this practice does not violate provisions of the Arizona Enabling Act. Each time the Court

⁶The Petition suggests that an amicus brief is to be filed by other states. If in fact any possible issues in this case raise problems applicable to other states, this Court will doubtless have opportunity to consider those issues in the context of a case whose procedural posture makes it appropriate for review.

has acknowledged that construction of highways through such lands results in a net benefit to the trust lands as a whole by making such lands accessible and usable for higher and more remunerative uses.

The issue upon which the holding of the Arizona Supreme Court rests is an issue of fact—an issue which could be reviewed by this Court only if this Court were willing simply to declare by fiat that the Arizona Court was wrong in holding that highways across trust lands in Arizona result in a net benefit to such trust lands. This is precisely the position that the Petitioner has been forced to take in its Petition.

Even if there were questions which warranted a grant of certiorari—and we respectfully urge that there are none—this Court in entertaining a review of this matter would encounter the same problems relating to the lack of a record which are evident from the Petition for Certiorari.

It is respectfully submitted that the Petition for Certiorari should be denied.

Respectfully submitted,

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